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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1806

LEO BAZILE,

Respondent,

versus

BISSO TOWBOAT COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Bisso Towboat Company, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on November 8, 1979.

OPINIONS BELOW

The opinion of the Fifth Circuit, entered on November 8, 1979, is reported at 606 F.2d 101 (5th Cir. 1979). It is reprinted in Appendix A hereto at page 1a, *infra*.

Rehearing and Rehearing En Banc were denied on February 14, 1980, as reported at 613 F.2d 314.

The District Court for the Eastern District of Louisiana issued an unreported minute entry on December 17, 1976, which is reprinted in Appendix B hereto at page 10a, *infra*.

JURISDICTION

The judgment of the Fifth Circuit was rendered on November 8, 1979. Rehearing and Rehearing En Banc were denied on February 14, 1980 as reprinted in Appendix D hereto at page 27a, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner presents for review the following issue:

1. Whether the Fifth Circuit erred in holding that a lay jury rather than the District Court is to be the sole trier of fact with respect to determination of the presence or absence of the District Court's jurisdiction over the subject matter before it.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section II of the Constitution of the United States provides in pertinent part:

> The Judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction. . .

46 U.S.C. §688, known as the Jones Act, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

33 U.S.C. §§901-50, known as the Longshoremen's and Harborworkers' Compensation Act, as amended in 1972, provides in pertinent part:

> §903(3) The term "employee" means any person engaged in maritime employment, in-

> cluding any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

and

> §903(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . .

STATEMENT OF THE CASE

A. Facts necessary to argument of the issues.

Petitioner, Bisso Towboat Company (hereinafter sometimes referred to as "Bisso"), came into existence in 1967. At that time, Captain Billy Slatten became

Bisso's first general manager, a position he continues to hold. Under Slatten's supervision, the company acquired six vessels which it operated in and about the Port of New Orleans.[1] The operation of this fleet of vessels required Bisso to have three offices. One was located on the Mississippi River where the fleet was maintained; the bookkeeping office was a mile or so away; and the third office was in downtown New Orleans.[2]

Respondent, Leo Bazile, was first hired by Bisso on June 20, 1970. Bazile was assigned various tasks for Bisso, which were limited to handling shoreside errands,[3] going to the bank,[4] ordering groceries,[5] carrying various documents between the three offices,[6], working for Captain Slatten's sporting goods store,[7] answering the telephone,[8] and procuring parts for the vessels in the Bisso fleet.[9] At no time was Bazile

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1 Transcript, page 32, lines 7-10; reprinted herein in Appendix C, page 19a.

2 Id. page 32, line 25; page 33, line 1; page 99, lines 12-15, page 273, lines 19-22; reprinted herein in Appendix C, pages 19a-20a.

3 Id. page 34, lines 11-16 and 23-24; page 100, lines 3-4; reprinted herein in Appendix C, page 20a.

4 Id. page 34, line 15; page 57, line 5; page 100, lines 3-9; reprinted herein in Appendix C, page 21a.

5 Id. page 57, lines 17-21; reprinted herein in Appendix C, page 21a.

6 Id. page 273, lines 19-22; reprinted herein in Appendix C, page 22a.

7 Id. page 100, lines 16-21; reprinted herein in Appendix C, page 22a.

8 Id. page 101, lines 21-23; reprinted herein in Appendix C, page 22a.

9 Id. page 57, line 5; reprinted herein in Appendix C, page 22a.

regularly assigned to any vessel or group of vessels in the Bisso fleet.

Bazile's compensation for the work he performed was fixed at $600.00 per month and was not dependent upon the number of days or hours he worked during any pay period.[10] Bazile slept at home and was provided a company car to assist him in his tasks.[11] The captains, deckhands and engineers employed by Bisso worked a schedule of forty-eight hours on and forty-eight hours off, and all were paid an hourly rate.[12] Bazile dressed in a coat and tie while about his appointed rounds.[13]

Bazile testified that his duties were primarily those of a deckhand and that he spent eighty to ninety percent of his time on the various Bisso vessels. Nevertheless, Bazile could name only four persons with whom he had worked on the various vessels, two of whom he was forced to admit worked ashore.[14] Furthermore, when asked to identify each vessel in the fleet and to state whether he had worked on it as a

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10 Id. page 23, lines 10-16; reprinted herein in Appendix C, page 23a.

11 Id.

12 Id. page 276, line 11; page 277, lines 1-3; reprinted herein in Appendix C, page 23a.

13 Id. page 244, line 14; page 274, lines 11-13; page 314, lines 19-21; page 319, line 6; reprinted herein in Appendix C, pages 23a-24a.

14 Id. page 112, lines 17-20; page 115, lines 10-17; reprinted herein in Appendix C, pages 24a-25a.

deckhand, Bazile could name only two or three isolated occasions that he did any work aboard any vessel in the many years he had been with the company.[15] Even then, Bazile had to admit under cross-examination that he was basically a passenger rather than a crewmember.

B. Course of proceedings and disposition of the case.

Bazile filed suit against Bisso in the United States District Court for the Eastern District of Louisiana, alleging that he was a member of the crew of the M/V CABB, that he had suffered injury on April 15, 1973, and that he was therefore entitled under the Jones Act[16] to damages in the amount of $900,000.00. A second cause of action under the General Maritime Law warranty of seaworthiness was also alleged.

On December 13 and 14, 1976, the case was tried before a jury. At the close of Bazile's case, Bisso moved for a directed verdict. The District Court took the motion under submission, and, after consideration, denied the motion without prejudice to Bisso to reurge it at a later point in the trial.

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15 Page 103, line 21 to page 104, line 2; page 104, line 25; page 105, lines 5, 17-22; page 106, lines 4-13, 18-19, 21; page 107, lines 5, 11-17; page 109, lines 18-19; reprinted herein in Appendix C, pages 25a-27a.

16 46 U.S.C. §688.

At the close of all the evidence, Bisso again moved for a directed verdict on the issues of Jones Act status, negligence and unseaworthiness. The District Court denied the motions on status and negligence, and granted the motion on the issue of unseaworthiness.

Following closing arguments, the jury retired to consider the evidence, and after two and one-half hours of deliberation, it returned a verdict for Bazile, finding that he was a seaman under the Jones Act, and that Bisso's negligence was the sole cause of his injury.

After dismissal of the jury, Bisso moved for a judgment notwithstanding the verdict, and, in the alternative, for a new trial. The District Court orally granted the motion for judgment notwithstanding the verdict and took the motion for a new trial under submission. On December 17, 1976, the District Court issued the opinion reprinted herein in Appendix B at page 10a *infra* in which it set forth its reasons for granting the judgment notwithstanding the verdict, and also granted the motion for a new trial conditioned on the reversal by the appellate court of its granting of a judgment notwithstanding the verdict. The basis for granting the new trial was that the jury verdict was contrary to the great weight of the evidence.

The United States Court of Appeals for the Fifth Circuit reversed the judgment notwithstanding the verdict and affirmed the grant of a new trial. In so doing, the Fifth Circuit first correctly stated that:

> The standard for granting a motion for a judgment notwithstanding the verdict requires that the trial court review all the evidence in the light most favorable to the opponent of the motion and if the trial court still finds that the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion for a judgment notwithstanding the verdict should be granted. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Having accurately set forth the general rule for determining the propriety of granting a judgment notwithstanding the verdict, the Fifth Circuit then, Bisso submits incorrectly, announced:

> It is also true that under *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945) the trial judge in a Jones Act case is bound by a stricter rule — only when there is a complete absence of probative facts supporting the verdict can he grant a motion for a judgment notwithstanding the verdict. 372 U.S. at 653, 66 S.Ct. 740.

Bisso then filed Petitions for Rehearing and Rehearing En Banc, asserting that the Fifth Circuit had grossly misstated the standard applicable to the jurisdictional status issue in Jones Act cases, with the result that Dis-

trict Courts in the Fifth Circuit are now completely interdicted from defining the parameters of federal subject matter jurisdiction in cases alleging Jones Act seaman's status. Both petitions were denied on February 14, 1980 as reprinted herein at page 27a, *infra*.

ARGUMENT

I. The Fifth Circuit's Decision Is Contrary To This Court's Holding In *Senko v. Lacrosse Dredging Corporation.*

The essence of this argument is very simple — this Court has declared that a jury's determination as to Jones Act seaman's status is conclusive only if a reasonable basis supporting it exists, but the Fifth Circuit has now held below that a reasonable basis is *not* necessary to support a jury's jurisdictional finding as to status.

Specifically, in *Senko v. Lacrosse Dredging Company,*[17] this Court reversed a state appellate court's ruling that there was insufficient evidence to support the jury's finding of seaman's status. In so doing, this Court declared that:

> Whether an injured person [is] a "member of a crew" is to be left to the finder of fact [means] that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that *a jury's decision*

17 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415 (1956).

> *is final if it has a reasonable basis,* whether or not the appellate court agrees with the jury's estimate. 352 U.S. at 374. (emphasis supplied).

The "reasonable basis" jurisdictional standard of the *Senko* test contrasts sharply with the liability and damages standard set forth in *Lavender v. Kurn, supra,* which held that "[o]nly when there is a *complete absence of probative facts* to support the conclusion reached [by the jury] does a reversible error appear."[18] (emphasis supplied) Rather, the standard set forth by this Court in *Senko* for jurisdictional determinations allows the District Court the needed latitude to weigh the evidence to the extent of determining if reasonable minds could find a plaintiff to be a seaman and member of the crew, and then to determine the presence or absence of its subject matter jurisdiction as a matter of law.

Because the Fifth Circuit ignored the *Senko* decision and actually announced a contrary rule of law for jurisdictional determinations, Bisso submits that this Honorable Court should reverse the decision below to the extent that it is inconsistent with *Senko.*

II. The Fifth Circuit's Decision Fails To Take Into Account The Jurisprudential History And The Relationship Between The Jones Act And The Federal Employers Liability Act.

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18 327 U.S. at 653.

The Fifth Circuit apparently assumed incorrectly: (1) that the *Lavender* "scintilla/any evidence" test applies to every Federal Employers Liability Act (FELA) issue, and (2) that this test must also apply to all Jones Act issues because of the incorporation of FELA by the Jones Act. Given that *Lavender* was a FELA case and that the Jones Act does basically incorporate FELA, the assumptions made by the Fifth Circuit at first blush seem reasonable. Nevertheless, further examination reveals that both assumptions are erroneous.

First of all, the Fifth Circuit failed to observe the obvious implications of the prior jurisprudence. Specifically, sixteen years before *Lavender*, this Court ended the reign of the "scintilla" rule in *Gunning v. Cooley*[19], which held that:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a

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19 281 U.S. 90 at 94 (1930). See also *Brady v. Southern Railway Co.*, 320 U.S. 476, (1943); *M. C. Carlisle and Co. v. Cross*, 386 F.2d 672 (1st Cir. 1967); *Wells v. Warren Co.*, 328 F.2d 666 (5th Cir. 1964); *Hogan v. U.S.*, 325 F.2d 276 (5th Cir. 1963); *Reuter v. Eastern Airlines*, 226 F.2d 443 (5th Cir. 1955); *Baltimore and O.R. Co. v. Postom*, 177 F.2d 53 (D.C. Cir. 1949).

> jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (citing cases)

This Court then resurrected the "scintilla" test, or a facsimile thereof which we will call the "scintilla/any evidence" test, in *Lavender* which held that "there was sufficient evidence of (FELA) *negligence* on the part of both [defendants] to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury," and that "[o]nly when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear."[20] (emphasis supplied) The obvious implication from this Court's abolishing the scintilla rule and then giving it renewed life as to FELA negligence is that *Lavender's* application should be restricted to situations in which the issue at hand is a stricter, statute dictated duty of care or lesser burden of proof, and that the general "reasonable basis" rule should continue to apply to all other, and especially jurisdictional, issues in those and other cases.

Bisso submits that the Fifth Circuit acknowledged that *Lavender* was a FELA case and that the Jones Act incorporates FELA, and therefore applied *Lavender* to the Jones Act status issue. The Fifth Circuit failed to notice that *Lavender* dealt only with the issue of negligence,

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20 327 U.S., at 652, 653.

which is accorded special treatment under FELA and the Jones Act in that the plaintiff's burden of proof is somewhat lessened, and that it was only because of this unique treatment of the negligence issue that *Lavender* applied the "scintilla/any evidence" test. Indeed, that test is appropriate in situations where a statute dictates that the burden of proof as to an issue is to be lessened, but as to other issues to which no special treatment is accorded, the reason for applying the "scintilla/any evidence" rule, and hence *Lavender*, is conspicuously absent. Unfortunately, this the Fifth Circuit apparently completely misunderstood.

Additionally, the Fifth Circuit "incorporated" *Lavender's* FELA rule as to status when, in fact, status is an issue only in Jones Act cases and not in FELA cases. Indeed, this Court has held that the term "employee" under FELA has no special meaning.[21] Because the FELA has no requirement of permanent assignment as found in the Jones Act,[22] it was clearly improper to apply by "incorporation" the liability rule of an FELA case to the jurisdictional status issue in this Jones Act case.

For these reasons, it was error for the Fifth Circuit to apply the *Lavender v. Kurn* "scintilla/any evidence" test in determining the propriety of granting a judgment notwithstanding the verdict as to the jurisdictional issue of seaman's status.

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21 *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227 (1959).

22 See e.g. *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

III. The Fifth Circuit's Application of *Lavender v. Kurn* To The Issue Of Seaman's Status Prevents A District Judge From Exercising Control Over Determination Of Its Jurisdiction.

Before fully developing this argument, it should be noted that the basic thrust of it is again very simple — there is no Jones Act case to which *Lavender, supra,* can apply, and therefore no jurisdiction in the District Court, until plaintiff has proved at least as a threshold matter that reasonable minds could find that he was a seaman and member of the crew of a vessel or fleet of vessels within the meaning of the Jones Act.

Article III, Section 2 of the Constitution provides that "[t]he Judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction. . ." Jones Act suits involve a federal question and may be brought on either the admiralty or law side of the court.[23] The Jones Act applies only between seamen and their employers and provides the only remedy available to such workers for employer negligence.[24] Thus, the Jones Act plaintiff's claim to federal jurisdiction stands or falls with his assertion that he is a seaman and member of the crew of a vessel or fleet of vessels. If the re-

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23 *Panama Railroad Co. v. Johnson,* 264 U.S. 375 (1924); 2A, Moore, Federal Practice, Section 8.09[2] page 8-60 (2d Ed. 1968).

24 46 U.S.C. §688.

quired status is found lacking, neither diversity of citizenship nor the two other grounds of maritime jurisdiction[25] could support the presence of federal jurisdiction, because, as stated above, the Jones Act provides the seaman's exclusive remedy for employer negligence.[26]

The decision below prevents District Courts in the Fifth Circuit from performing their Constitutional duty of determining the presence or absence of jurisdiction over the subject matter[27] before them in that parties such as Bazile are allowed to make out a Jones Act case and therefore a "federal case" solely by self-serving testimony that their duties were those of crewmembers. The Fifth Circuit's decision completely interdicts the District Court from deciding this jurisdictional issue to the contrary, even in the face of overwhelming testimonial and documentary evidence contradicting and impeaching plaintiff's self-serving testimony.

The Fifth Circuit's allowing the jury to and preventing the District Court from defining the parameters of

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25 The Admiralty Extension Act, 46 U.S.C. §740; *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 240 (1972).

26 Non-seamen would be covered by either the state Workmen's Compensation statute or the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902 *et seq.* See section V below.

27 The boundaries of federal jurisdiction are set forth in Article III, Section II of the Constitution of the U.S.

federal jurisdiction offends the jurisdictional arrangement set forth in the Constitution and interpreted by the Courts. Surely every plaintiff who brings a Jones Act suit is willing to testify that he did crew's work or else he would not have filed such a suit. With the District Court no longer having any discretion, and remembering that the same standard applies to directed verdicts as to judgments notwithstanding the verdict,[28] all cases in which Jones Act status is alleged must irretrievably be submitted to a jury for jurisdictional determination, even though the District Court may be prepared to hold as a matter of law that plaintiff was not a seaman at the pertinent time.

The constitutional infirmities and lack of judicial economy created by the decision below demonstrate that the District Court's limited power over the jurisdictional issue of seaman's status must be restored. For example, and with no disrespect meant, under the decision as rendered by the Fifth Circuit, a circus clown who works in the center ring under the big top in Omaha, Nebraska could bring a Jones Act suit and prevent the District Court's taking of the jurisdictional question of status from the jury merely by testifying that his duties were those of a deckhand or other member of the crew of a vessel in navigation. Under the Fifth Circuit's decision, the District Court can enter

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28 *O'Neill v. W. R. Grace & Company*, 410 F.2d 908 (5th Cir. 1969), *reh. den.* (1969); Moore, Federal Practice, Section 50.07 [2], page 50-76 (2d ed. 1979).

neither a directed verdict nor a judgment notwithstanding the verdict, even if the testimony of all the other witnesses, as well as all the *documentary* evidence, were to the contrary. The only corrective measure available to the District Court would be to grant a new trial and thereby force the parties to relitigate the matter.

Moreover, many courts have recognized the devastating jurisdictional consequences that follow when a District Court is prevented from deciding the jurisdictional status issue even though reasonable minds could not find plaintiff to have been a seaman. Indeed, only four years ago, the Fifth Circuit, in *Holland v. Allied Structural Steel Co., Inc.*,[29] declared with this Court's approval that:

> . . . there remains the *jurisdictional* requirement that a claimant alleging seaman status under the Jones Act have been connected, in more than a transitory way, with a vessel or vessels, and that his injuries have arisen in the course of his duties in the service of such a vessel or vessels. See, e.g., *Keener v. Transworld Drilling Co.*, 5 Cir. 1972, 468 F.2d 729, 732; *Burns v. Anchor-Wate Co.*, 5 Cir. 1973, 569 F.2d 732; *Owens v. Diamond M. Drilling*, 5 Cir. 1973, 487 F.2d 74, 76. (Emphasis supplied) 539 F.2d at 479.

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29 539 F.2d 476, 479 (5th Cir. 1976) *reh. and reh. en banc denied* (1976), *cert. den.* 429 U.S. 1105 (1977).

The *Holland* court also recognized that jurisdictional determination of Jones Act status is by necessity a mixed question of fact and law, and further declared that:

> Though ordinarily a question to be resolved by the trier of fact, "the district court may properly refuse to submit [the] issue to the jury where the only *rational* inference to be drawn from the evidence is "that the claimant was not a seaman. *Owens v. Diamond M. Drilling Co.*, 487 F.2d at 76."

By the use of the word "rational", the Fifth Circuit exhibited, at least as recently as four years ago, its understanding that the standard of *Lavender v. Kurn, supra,* properly could not and should not be applied to the jurisdictional status issue.

Additionally and most importantly, the danger that arises from interdicting the District Court in these matters has not gone unnoticed by this Court. In *Senko v. Lacrosse Dredging Corp., supra,* Justice Harlan stated in his dissent[30] which was joined by Justices Frankfurter and Burton that:

> The fact that it was a jury that found Senko to be "a member of a crew" does not relieve us of the responsibility for seeing to it that what is

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30 352 U.S., at 378. That this statement was expressed in dissent is of no significance in that, as shown above, the majority opinion also supports petitioner's position.

> in effect a *jurisdictional requirement of the Jones Act* is obeyed. (Emphasis supplied).

The need for judicial protection of the Jones Act's jurisdictional requirement has not lessened since the time Justice Harlan's reasoning was published.

In light of the staggering consequences that the Fifth Circuit's decision has effected upon the Constitutional parameters of federal jurisdiction, Bisso submits that this Court should now return to the District Court its limited discretion as to determining the presence or absence of Jones Act jurisdiction as a matter of law in cases in which no reasonable mind could hold otherwise.

IV. The Fifth Circuit's Decision Is In Conflict With The Treatment Accorded The Status Issue In All Other Circuits.

That Bisso's position has merit and the decision below is in error is further illustrated by showing that of all reported applications of *Lavender*, not one court, state or federal, trial or appellate, has ever applied the *Lavender* "any evidence" standard to the jurisdictional question of seaman's status, or any other jurisdictional question. *Lavender's* application in Jones Act cases has quite properly, until the decision below in this matter, been restricted to liability issues arising from the more onerous negligence and causation standards set forth in and required by the Jones Act.

Surely the fact that only the Fifth Circuit, of all the courts in the land, has chosen to apply *Lavender* in determining the propriety of granting a motion for a judgment notwithstanding the verdict as to the jurisdictional issue of seaman's status suggests that this Court should further examine the decision below. This is especially true when it is considered that this drastic deviation from the rule of law applied nationwide was accomplished in a single sentence and without any discussion or consideration of either the prior jurisprudence or the staggering consequences which follow.

V. Bazile's Claim Is That Of An Injured Longshoreman And Therefore Compensable Under The Longshoremen's And Harbor Workers' Compensation Act.

Before concluding, Bisso wishes to advise this Court that it is not suggesting that Bazile's injuries, if any, are not compensable under law. Indeed, it is, has been, and will continue to be Bisso's position that Bazile's claim lies not under the Jones Act but rather within the ambit of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA"), as amended in 1972,[31] which defines "employee" as:

> §903(3) . . . any person engaged in maritime employment, including any longshore-

31 33 U.S.C. §§901 *et seq.*

> man or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The LHWCA then delineates its coverage as follows:

> §903(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . .

Bisso submits that Bazile satisfies the "employee" or status requirement of the LHWCA in that carrying groceries on to and off of vessels is precisely the type of work historically performed by longshoremen, and, it should be noted, very unlike the work of seamen. Also, Bazile's alleged injury occurred while he was on a wharf adjoining navigable water and clearly falls within the above quoted situs requirement of the LHWCA.

It is for these reasons that Bazile's alleged injury is covered by the LHWCA, which by its terms excludes from coverage seamen and crewmembers.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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and

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CLAVERIE & SIMS
Attorneys for
Bisso Towboat Company

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on Darryl J. Tschirn, Esq., of Covington, Louisiana this date by mailing same as required by Rule 33-1 of this Court.

New Orleans, May ____, 1980.

WINSTON EDWARD RICE

APPENDIX A

Leo BAZILE,
Plaintiff-Appellant,

versus

BISSO MARINE CO., INC.,
Defendant,

Bisso Towboat Co.,
Defendant-Appellee.

No. 77-1015

United States Court of Appeals,
Fifth Circuit

Nov. 8, 1979

* * *

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GOLDBERG and FAY, Circuit Judges.

FAY, Circuit Judge:

This case was brought in the United States District Court for the Eastern District of Louisiana by Leo

Bazile against Bisso Towboat Company alleging that he was a member of the crew of the various vessels owned by Bisso and that he was injured due to the negligence of Bisso and was therefore entitled to $900,000 in damages. The jury found that plaintiff was a seaman and that he was entitled to $250,000 in damages from Bisso Towboat Company. The trial judge granted a judgment notwithstanding the verdict and, in the alternative, granted a motion for a new trial. Although we recognize this is an unusual case we believe the different standards of review for a judgment notwithstanding a verdict and granting a new trial require us to reverse the judgment notwithstanding the verdict and affirm the granting of a new trial.

I. FACTS

The defendant, Bisso Towboat Co., operates six vessels and hired plaintiff, Leo Bazile in 1970. Plaintiff's testimony was that throughout his employment and until his injury he performed various tasks for Bisso Towboat as a deck hand. He further testified that he spent from 80-90 percent of his working time on board the Bisso fleet, that he ran errands for Bisso and that he performed whatever tasks Captain Slatten asked him to perform. He testified that he went on board the Sally R (one of the vessels): "I just went down — go up the river with it or go down the river with it; one thing or another. Not to spend no significant amount of time." T. at 103. He stated that he thought he had been a deck

hand on the Independent, another of Bisso's tug boats, which Bazile says may have sunk in 1972 or 1973. He said he was a deck hand on the tug boat, Cecilia: "I was a deck hand at the time. I was a deck hand for the Bisso Boat Company for me to go out and bring stores or do anything they said. If they didn't show up I would have to do whatever Captain Slatten say to do and I have to do it." T. at 105. He stated that he helped run the Cappy and was a standby on that vessel. He also stated that he worked on the Bisso to "build up steam" and in answer to a question "Did you go on it [the Bisso] when it left the dock?" he said "It moved out in the river and up from one end of the dock to another; shifting from one place to the other." T. at 107. He further testified that he "moved away from the dock" with the Billy Bisso. Bazile's testimony was that he was not assigned to one particular boat but that he did go away from the dock numerous times at night on various vessels belonging to his employer. He stated that he performed various duties: "For example, like I say, I take inventories, I went on to take lines onto them to bring guys on them, and help guys with lines, and on occasions we would take guys off of the boat." T. at 157. He explained that during the course of his duties he sometimes had to "get on one boat to get over to the next one" and that the boats were not all at the dock. T. at 157. He said he rode on the boats up or down the river and that he was there "to help them with whatever they had to do." T. at 158-159. He testified that he helped paint the Billy Bisso and that he sometimes carried cables onto the vessels. Although it appears he was provided with a car

and he often took the car home after work, he stated that other deck hands employed by Bisso Towboat also used the company car to get sandwiches.

The payroll journal of the Bisso Towboat Company covering the period from the beginning of plaintiff's employment with Bisso until his accident, which listed the crew members of each vessel, indicated that plaintiff was employed and paid as an office worker. Aside from Captain Slatten, the defendant called nine witnesses on the status issue, including the dispatcher for Bisso, the Bisso record keeper, and several other employees of Bisso who had worked closely with the plaintiff. All testified that he was essentially an errand runner, that he had never worked as a deck hand and that he was only on board the vessels occasionally and only incidental to his work as a runner. Plaintiff's compensation was $600 a month.

Plaintiff testified that on the day of his alleged accident he had been taking inventory of groceries aboard some of the tug boats. While carrying a box of canned goods away from a vessel on the dock, the plaintiff testified that the Sally R pulled up to the dock and knocked against it, causing the dock to move up and down and that, as a result, plaintiff lost his balance and fell. An invoice introduced by defendant showed that on the day of the accident the Sally R was not in New Orleans, where the injury to plaintiff occurred, but was in Boothville.

The jury returned a verdict for the plaintiff, finding that he was a seaman under the Jones Act, that the defendant's negligence was the sole cause of the injury, and that the plaintiff was entitled to recover $250,000 in damages from defendant. After the jury was dismissed the defendant moved for a judgment notwithstanding the verdict and alternatively for a new trial. The motion for judgment notwithstanding the verdict was granted based on the lack of plaintiff's credibility as a matter of law and also on the finding that, taking plaintiff's testimony as correct, except where inconsistent, plaintiff did not present sufficient evidence to support the determination of seaman's status made by the jury. The motion for new trial was taken under submission and was later granted conditioned on the reversal of the judgment notwithstanding the verdict.

II. SCOPE OF REVIEW

It is clear that where a party seeks a judgment notwithstanding the verdict or, in the alternative, a new trial, if the trial court grants the judgment notwithstanding the verdict and grants the new trial in the alternative, the judgment notwithstanding the verdict is final and the court of appeals can review both rulings. See, Fed.R.Civ.P. 50(c)(1).

> This departure from the normal rule that a motion granting a new trial is interlocutory

> and non-appealable is justified by the obvious fact that the principal judgment is clearly final; the new trial grant will never be effective unless the judgment is overthrown. Since the principal judgment is appealable, it would be wasteful to hold that the Court of Appeals cannot review all that happened below in the event that it holds the grant of judgment notwithstanding the verdict to have been erroneous.

9 Moore's Federal Practice §110.08[3], at 122 (2d. ed. 1948). Thus, we have jurisdiction to consider both the judgment notwithstanding the verdict and the new trial.

A. Judgment Notwithstanding the Verdict

The standard for granting a motion for a judgment notwithstanding the verdict requires that the trial court review all the evidence in the light most favorable to the opponent of the motion and if the trial court still finds that the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion for a judgment notwithstanding the verdict should be granted. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). It is also true that under *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945) the trial judge in a Jones Act case is bound by a stricter rule —

only when there is a complete absence of probative facts supporting the verdict can he grant a motion for a judgment notwithstanding the verdict. 327 U.S. at 653, 66 S.Ct. 740.

We find that even applying the less strict standard of *Shipman* the granting of the motion for a judgment notwithstanding the verdict was improper. There was sufficient testimony from the plaintiff to support a verdict that he was a seaman. He testified that he was assigned to all the tug boats and that he often brought supplies to all of them, helped with the lines, helped paint a tug boat and would perform whatever tasks Captain Slatten requested him to perform on any of the vessels. Furthermore, his testimony revealed that at times when a tug boat was away from the dock area Bazile would be on board performing whatever tasks were necessary and requested of him. We do not believe that *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) restricts a seaman to a person assigned only to one vessel.[1] Rather, a person can be a seaman assigned to a fleet of vessels and the question is sufficient to go to the jury as long as he was assigned permanently to these vessels or performed a substantial part of his work on these vessels and if the capacity in which he was employed or the duties which he performed contributed to the function of these vessels, or to the ac-

1 The jury instructions given by the trial judge on what is necessary in order to find that someone is a seaman were clearly adequate.

complishment of its mission, or to the operation or welfare of these vessels in terms of maintenance during its movement or during anchorage for its future trips. 266 F.2d at 779. Bazile's duties on the vessels contributed to the operation and maintenance — he painted, helped bring supplies to them, helped with the lines, helped dock the tugs, and performed whatever duties were necessary for its maintenance and operation as he was told. Plaintiff's testimony was that he worked on the vessels 80-90 percent of the time. He further testified that on the day of the accident he had been taking inventory of groceries aboard some of the vessels. While carrying a box of canned goods away from a vessel on the dock, plaintiff testified that the Sally R pulled up to the dock and knocked against it, causing the dock to move up and down and as a result plaintiff lost his balance and fell. Although his testimony was contradicted by an exhibit produced by defendant which indicated that the Sally R may not have been in New Orleans on the day of the accident, the jury could certainly have believed plaintiff instead of relying on the invoice produced by defendant which was prepared seven days after the office got a report from the tug boat relating where it had been. The jury could have believed plaintiff instead of defendant's witnesses and the number of defense witnesses is certainly irrelevant as to what could or could not be believed. There was sufficient testimony from which the jury could have found that plaintiff was a seaman, that defendant's negligence was the sole cause of the injury and that the plaintiff was entitled to recover $250,000.

B. New Trial.

As far as the motion for a new trial, the trial judge can grant a new trial if he believes the verdict is contrary to the weight of the evidence. See, e.g., *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Marsh v. Illinois Central Rail Co.*, 175 F.2d 498 (5th Cir. 1949). Although a trial judge cannot weigh the evidence when confronted with a motion notwithstanding the verdict, in a motion for a new trial the judge is free to weigh the evidence. As an appellate court, our review of the granting of the motion for a new trial is severely limited — the lower court's action is discretionary and we may interfere only when the court abuses its discretion or fails to exercise it. *Hampton v. Magnolia Towing Co.*, 338 F.2d 303, 306-307 (5th Cir. 1964). After careful consideration of the record we are not prepared to hold that the trial judge abused his discretion in granting the motion for a new trial. The only witness who supported plaintiff's story was the plaintiff.[2] Because in a motion for a new trial he may weigh the evidence, the trial judge could have placed great weight on the witnesses presented by defendant who testified that Bazile was not a member of the crew and did not perform duties of a seaman and little or no weight upon Bazile's testimony. The trial judge could have determined that the manifest weight of the evi-

2 At trial Captain Slatten testified that in 1970 he executed a United States Public Health Master's Certificate which classified Leo Bazile as a deck hand/wiper on a vessel in the Bisso fleet but that he falsified the certificate in order to help Bazile obtain hospital care. Captain Slatten said that at the time he executed the certificate Bazile was not a seaman.

dence indicated that Bazile's job was that of an office worker and not a seaman.

III. CONCLUSION

Because we are presented with different standards of review, we find that it was error on the part of the trial judge to grant the motion notwithstanding the verdict but find that it was within his discretion to grant the motion for a new trial. Accordingly, we REVERSE the judgment notwithstanding the verdict and AFFIRM the granting of the new trial.

APPENDIX B

MINUTE ENTRY
SEAR, J.
DECEMBER 17, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LEO BAZILE

versus CA No. 75-1955(G)

BISSO MARINE CO., INC., ET AL.

The captioned matter was tried on December 13-14, 1976. At the close of the plaintiff's case the defendant

moved for a directed verdict which was denied. The motion was re-urged at the close of all the evidence and again denied. The jury returned a verdict for the plaintiff, finding that he was a seaman under the Jones Act, that the defendant's negligence was the sole cause of his injury, and that the plaintiff was entitled to recover $250,000 in damages from the defendant. After the jury was dismissed the defendant moved for a judgment notwithstanding the verdict, and alternatively for a new trial. The motion for judgment notwithstanding the verdict was granted for the reasons assigned in court and re-asserted here. The motion for a new trial was taken under submission.

Although the standard for granting a judgment notwithstanding the verdict is identical to that for granting a directed verdict, the denial of a directed verdict does not preclude consideration of a later motion for judgment notwithstanding the verdict. Indeed, unless a motion for a directed verdict at the close of the evidence has been made and denied, the court may not entertain a motion for judgment notwithstanding the verdict. Rawls v. Daughters of Charity of St. Vincent De Paul, Inc., 5 Cir. 1974, 491 F.2d 141, cert. denied, 95 S.Ct. 513. According to the terms of Rule 50(b), Fed. R. Civ. P., when the court denies the motion for a directed verdict, the court's ruling does not function as a final denial, but instead "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

The standard for deciding a motion for directed verdict or motion for judgment notwithstanding the verdict has been stated in this Circuit as follows:

> "It is well established that a judgment notwithstanding the verdict should not be granted unless under the evidence, together with all inferences that can be reasonably drawn therefrom, there can be but one reasonable conclusion as to the proper judgment. O'Neil v. W. R. Grace & Co., 5 Cir., 1969, 410 F.2d 908; Leach v. Millers Life Ins. Co. of Tex., 5 Cir., 1968, 400 F.2d 179."

Continental Insurance Co. of New York v. Sherman, 5 Cir. 1971, 439 F.2d 1294, 1300. The court must view the evidence in the light most favorable to the party against whom the motion is made. It may not weigh the evidence, pass on the credibility of witnesses, or simply substitute its appreciation of the facts for that of the jury. Wright & Miller, 9 Federal Practice and Procedure §2524. Nonetheless, evidence manifestly at variance with physical facts must be disregarded. Southern Pacific Co. v. Matthews, 5 Cir. 1964, 335 F.2d 924, 927. Furthermore, a narrow exception to the rule that the court may not consider credibility is the principle that "testimony concerning a simple fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross examination, must be taken as true." Chicago, R.I. & P. Rwy. Co. v. Howell, 10 Cir. 1968, 401 F.2d 752,

754. Moreover, the Fifth Circuit has recently recognized, in the context of the seaman's status issue, that testimony may be so contradicted by documentary evidence that reasonable men could not believe it. In these circumstances, testimony may be incredible as a matter of law. Holland v. Allied Structural Steel Co., Inc., 5 Cir. 1976, 539 F.2d 476, 483.

The threshold question in the instant case was whether or not the plaintiff was a seaman. If plaintiff was not a seaman, he was not entitled to recover under the Jones Act.

On the status issue, two witnesses were called by the plaintiff: the plaintiff himself and Captain William Anthony Slatten, plaintiff's supervisor at Bisso Towboat Co., under cross-examination. Captain Slatten testified that the plaintiff was employed by Bisso Towboat Co. essentially as an errand runner, and that he had never been assigned to duty on any of Bisso's tugs. Captain Slatten was then confronted with a Master's Certificate of Service signed by him indicating that the plaintiff was employed by Bisso Towboat Co., Inc. as a "wiper — deckhand". Plaintiff's Exhibit 1. Captain Slatten's explanation was that he had falsified the Master's Certificate as a personal favor to the plaintiff, in order that the plaintiff could obtain free treatment as a seaman at the United States Public Health Hospital. Captain Slatten testified that plaintiff was seriously ill with diabetes at the time he made out the certificate, and he felt that the circumstances somewhat justified his admitted falsification.

The plaintiff testified that he was employed as a deckhand by Bisso Towboat Co., and that he spent from eighty to ninety percent of his time on the tugs. When pressed for details of his specific duties aboard the tugs plaintiff was vague and unresponsive. When asked for approximate dates of time spent on tugs, plaintiff gave two or three examples, but his own specific testimony on this point did not equate with his blanket conclusion that he spent eighty to ninety percent of his time on the tugs. Plaintiff's testimony in this regard was contradicted by the payroll journal of the Bisso Towboat Co. covering the period from the beginning of plaintiff's employment with Bisso until his accident, which listed the crew members of each vessel, and indicated that plaintiff was employed and paid as an office worker. Defendant's Exhibit 6. Further documentary evidence of plaintiff's status was plaintiff's enrollment record card for group insurance with his employer, which listed plaintiff's position as "assistant office manager." Defendant's Exhibit 1. Plaintiff himself admitted that he was furnished with a company car in which to do various errands, and it was uncontradicted that no other seagoing employee of Bisso Towboat Co. was provided with a car.

Plaintiff testified that on the day of his alleged accident he had been taking an inventory of groceries aboard some of the tugs. While carrying a box of canned goods away from a tug on the dock, according to the plaintiff, the Tug SALLY R pulled up to the dock

and knocked against it, causing the dock to move up and down with the result that plaintiff lost his balance and fell. Plaintiff's testimony in this regard was contradicted by an invoice on the SALLY R which showed that on the day of the accident the SALLY R was not even in New Orleans, the site of the accident, but instead was in Boothville. Defendant's Exhibit 5. Plaintiff himself was the only witness to the alleged accident.

Aside from Captain Slatten, the defendant called nine witnesses on the status issue, including the dispatcher for Bisso, the Bisso record keeper, and several other employees of Bisso who had worked closely with the plaintiff. All testified that the plaintiff was employed essentially as an errand runner, that he had never worked as a deckhand for Bisso, and that in fact, he had never been seen aboard any of the tugs, except as it might occasionally be incidental to his work as an errand runner.

Accepting plaintiff's testimony as accurate, except for his conclusion that he spent eighty to ninety percent of his time on board the tugs, a statement contradicted by his own testimony, there was not sufficient evidence as a matter of law to support the jury's finding that plaintiff was a seaman. Moreover, in light of the contradictions inherent in plaintiff's testimony and between that testimony and the documentary evidence, and considering the unimpeached testimony of nine defense witnesses (that is excluding Captain

Slatten), we believe that plaintiff's testimony was incredible as a matter of law. This becomes more apparent when the instant case is compared with Holland v. Allied Structural Steel Co., Inc., 5 Cir. 1976, 539 F.2d 476, in which the Fifth Circuit found testimony not only of the plaintiff, but of seven plaintiff's witnesses, to be incredible as a matter of law, because it was self-contradictory and contrary to the physical evidence. In this case, the plaintiff has not produced one single witness to corroborate his story. However, we emphasize that the decision to grant defendant's motion for a judgment notwithstanding the verdict, was based not only on the lack of plaintiff's credibility as a matter of law, but also, on our finding that taking plaintiff's testimony as correct, except where inconsistent, plaintiff did not present sufficient evidence to support the determination of seaman's status made by the jury.

We must next consider the motion for a new trial. When the motion for a judgment notwithstanding the verdict is presented alternatively with a motion for a new trial, it is essential that the court rule on both branches of the motion. Rule 50(c)(1), Fed. R. Civ. P.; 9 Wright & Miller, Federal Practice and Procedure §2539. This places the district court in the awkward position of assuming that its grant of judgment will be reversed. Momand v. Universal Film Exchange, Inc., D. Mass. 1947, 72 F.Supp. 469, 483, aff'd 1 Cir. 1948, 172 F.2d 37, cert. denied 69 S.Ct. 939. Conditioned on the reversal of the judgment notwithstanding the verdict, we believe that a new trial should be granted.

Rule 59(a), Fed. R. Civ. P. provides in part:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;"

The trial judge has broad discretion to grant a new trial if he deems it is in the interest of justice to do so. United States for Use of Weyerhaeuser Co. v. Bucon Constr. Co., 5 Cir. 1970, 430 F.2d 420; Delta Engineering Corp. v. Scott, 5 Cir. 1963, 322 F.2d 11, rehearing denied 1964, 325 F.2d 432, cert. denied, 84 S.Ct. 1164. A common ground for granting a new trial, and the one we believe appropriate here, is that the verdict is contrary to the weight of the evidence. Unlike the motion for a directed verdict or for judgment notwithstanding the verdict, on a motion for a new trial, the court is free to weigh the evidence. United States ex rel. T.V.A. v. 544 Acres of Land, etc., E.D. Tenn. 1969, 309 F.Supp. 46. The standard against which to measure the weight of the evidence on a motion such as this one, has been widely debated. It has been said that a new trial may be granted and the verdict of the jury set aside even though there is substantial evidence to support it. United States for Use of Weyerhaeuser Co. v. Bucon Constr. Co., 5 Cir. 1970, 430 F.2d 420, 423; Hamption v. Magnolia Towing Co., 5 Cir. 1964, 338 F.2d 303. However, we believe that the instant case requires no deli-

cate balancing or drawing of fine lines. In this case, the *overwhelming* weight of the evidence as summarized above is contrary to the jury's verdict that the plaintiff was a seaman.

Accordingly, defendant's motion for a new trial is GRANTED, conditioned on the reversal of the judgment entered by the court notwithstanding the verdict of the jury.

New Orleans, Louisiana, December 17, 1976.

/s/ MOREY L. SEAR
MOREY L. SEAR
UNITED STATES
DISTRICT JUDGE

APPENDIX C

[32] TESTIMONY OF
CAPTAIN WILLIAM A. SLATTEN

* * *

A The Cecilia Bisso and, the Captain Bisso. The boats in operation were the Independent, the Leo, the Alma S, the Cecelia Bisso, the Captain Bisso and the Sally R. Six boats in operation.

* * *

[32] A We have a billing office at 632 S. Carrollton
[33] Avenue. The fleet office is on Walnut Road.

* * *

[99] TESTIMONY OF LEO BAZILE

* * *

Q Well, did the Bisso Towboat Company have an office in the downtown area at that time?

A Yes, they had one at the International Trade Mart.

* * *

[273] TESTIMONY OF
CAPTAIN WILLIAM A. SLATTEN

* * *

A Well, Leo did a lot of running for me. We had offices in the ITM Building, spent time down there picking up stuff and bringing it up to the office. We had a shop on Carrollton Avenue.

* * *

[34] Q You don't remember. The best you can remember was Leo made, at that time, approximately $600.00 a month straight salary and he was like an errand boy to run errands?

A He had an automobile and a gas account and was supposed to make himself available to run to the bank and different errands for me.

* * *

Q Captain Slatten, you hired Mr. Bazile in 1970 as an errand boy?

* * *

[100] TESTIMONY OF LEO BAZILE

* * *

A I went to the bank. I went to pick up the supplies.

* * *

[34] TESTIMONY OF
CAPTAIN WILLIAM A. SLATTEN

A He . . . was supposed to make himself available to run to the bank . . .

* * *

[57] A He would go to the bank, pick up parts, . . .

* * *

[100] TESTIMONY OF LEO BAZILE

A I went to the bank. I went to pick up the supplies.
Q Did you go to the bank regularly?
A It all depended on what he wanted me to do.
Q How many times a week would you go to the bank?
A Sometimes twice and sometimes I didn't go at all.

* * *

[57] TESTIMONY OF
CAPTAIN WILLIAM A. SLATTEN

A No, he didn't buy any groceries. Trying to remember, he might have ordered groceries. He ordered groceries over the phone, picked up the phone and said "Look, I want eggs, bacon, . . .", this and that. He called the orders in. James Butler picked them up . . .

* * *

[273] A Well, Leo did a lot of running for me. We had offices in the ITM Building, spent time down there picking up stuff and bringing it up to the office. We had a shop on Carrollton Avenue . . .

* * *

[100] TESTIMONY OF LEO BAZILE

Q Did Captain Slatten own a supply store?
A Yes.
Q Where is that store?
A On Carrollton Avenue.
Q Did you spend any time running there?
A I told you I did.

* * *

[101] A I answered phones if I was there because he told me to stand by there, he wanted to talk to me. That was the point to get in contact with me.

* * *

[57] TESTIMONY OF
CAPTAIN WILLIAM A. SLATTEN

A He would go to the bank, pick up parts, . . .

* * *

[34] Q It is possible he could have or couldn't have. You don't remember. The best you can remember was Leo made, at that time, approximately $600.00 a month straight salary and he was like an errand boy to run errands?

A He had an automobile and a gas account and was supposed to make himself available to run to the bank and different errands for me.

* * *

[276] A They work 48 on and 48 off watches on the boat.

* * *

[277] Q If he worked 48 hours on and 48 hours off — say, if he worked 72 hours straight, would he be compensated?

A Sure. He got paid if he worked over a period.

* * *

[244] TESTIMONY OF DANIEL DAVIS

A Yes, he kept his tie on.

* * *

[274] TESTIMONY OF JAMES BUTLER

A He dressed appropriately. Sometimes he had a coat and tie on, and sometimes he left his coat and tie in the car. He didn't come to work in overalls.

* * *

[314] Q Do you know how Mr. Bazile used to dress when he came to work?

A Practically dressed like he's dressed now.

* * *

[319] TESTIMONY OF
MISS JOHNIE THOMAS

THE WITNESS:

He had a coat and tie on.

* * *

[112] TESTIMONY OF LEO BAZILE

Q That's Falgout, Mr. Lasayer, Mr. Dan Davis, Mr. Butler, those are the people you can remember you worked with?

A Yes.

* * *

[115] Q And one of those was James Butler?

A He was in the yard.

Q And one of the other people you mention is Dan Davis?

A I helped Dan move barges.

Q He's not regularly assigned to any boats?

A All of the guys go from one rig to another they send them anywhere. They do odd jobs.

* * *

[103] Q Did you spend any time in '73 on the Independent?

A In working on it in the yard.

Q What kind of work?

A Taking inventory, helping them on the boat.

Q Did you ever go out there on the Independent in [104] 1973 as a deck hand?

A '73? No, I didn't.

* * *

Q Did you work as a deck hand on the Cecilia?

[105] A No, I worked on the boat to bring, take inventories and bring stores aboard and rode on it.

Q You never took any trips on it?

A Yes. Not as a deck hand. I rode down to it to bring supplies and stores.

* * *

A The time I went on the Sally R?

Q The Sally, yes.

A I went to bring stores or take something off, you know, what I mean, bring some lines or take some off.

Q You never did go and substitute as a deck hand?

A No, I did not.

* * *

[106] Q When were you on the Leo?

A Well, during the same time I had to go on one to the other.

Q Can you tell me the year?

A Well, I been on the Leo. I went on the Leo in '73, February of '73.

Q February, 1973 you worked on the Leo?

A Went on it to bring stores, like I say.

Q You didn't go on the Leo to work as a deck hand?

A No, I didn't.

* * *

Q . . . On the Independent did you work as a deck hand?

A No, I hadn't.

Q What other boats?

A On the Cappy.

* * *

[107] A If you feel like helping another guy you do it, if you want to.

* * *

Q The Bisso. Did you ever work as a deck hand on that boat?

A I worked on it to build up steam. That's what they used that boat for.

Q When did you do that?

A Right before they junked it in '71, I think it was.

* * *

[109] Q Did you work on the Billy Bisso as a deck hand?

A No, I didn't.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OFFICE OF THE CLERK

FEBRUARY 14, 1980

Gilbert F. Ganucheau,
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 77-1015 LEO BAZILE -vs- BISSO MARINE CO., INC., BISSO TOWBOAT, CO., (CA-75-1955)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ PEGGY KELLER
Deputy Clerk

cc: Mr. Robert B. Keaty
Mr. Darryl J. Tschirn
Mr. William W. Healy, III
Mr. William B. Gibbens, III
Mr. Winston Edward Rice

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BISSO TOWBOAT COMPANY,
Petitioner,

versus

LEO BAZILE,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 79-1806

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

BISSO TOWBOAT COMPANY,
Petitioner,

versus

LEO BAZILE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Leo Bazile, prays that this Honorable Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on November 8, 1979.

OPINIONS BELOW

The District Court for the Eastern District of Louisiana issued an unreported minute entry on December 17, 1976, which is reprinted in Appendix B in the Petition. The opinion of the Fifth Circuit, entered on November 8, 1979, is reported at 606 F.2d 101 (5th Cir. 1979). (Petitioner's Appendix A). Rehearing and Rehearing En Banc were denied on February 14, 1980, as reported at 613 F.2d 314.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the Fifth Circuit erred in holding that a lay jury rather than the District Court is to be the sole trier of fact with respect to determination of the presence or absence of the District Court's jurisdiction over the subject matter before it.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A) at pages 1-A through 5-A in the Petitioner's Brief. Respondent disagrees with the statement of the case as set forth by

the Petitioner to the extent that it does not include all of the facts as set forth in the Court of Appeals Opinion.

ARGUMENT

I. The Fifth Circuit's Decision Is Not Contrary To This Court's Holding In *Senko vs. Lacrosse Dredging Corporation.*[1]

In its Brief, the Petitioner states that the Fifth Circuit ignored the *Senko* decision and actually announced a contrary rule of law for jurisdictional determinations. The Petitioner states this error occurs as a result of the Court of Appeals relying on *Lavender vs. Kurn*[2] in reversing the District Court's granting of a Judgment Notwithstanding the Verdict. Clearly, the Court of Appeals did not follow Lavender, supra, in making its determination. The pertinent part of the Court's Opinion is found on Page 7-A of the Petitioner's Brief where the Court applied the standard as set forth in *Boeing Company vs. Shipman:*[3]

> "We find that even applying the less strict standard of *Shipman,* the granting of the Motion for a Judgment Notwithstanding the Verdict was improper. There was sufficient

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1 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415 (1956).

2 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945).

3 411 F.2d 365 (5th Cir. 1965).

testimony from the plaintiff to support that he was a seaman."

The standard for granting a Motion for Judgment Notwithstanding the Verdict requires that the Trial Court review all the evidence in the light most favorable to the opponent of the Motion and if the Trial Court still finds that the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the Motion for Judgment Notwithstanding the Verdict should be granted. *Boeing Company vs. Shipman, supra.* This was the standard applied by the Fifth Circuit which Respondent submits was correct.

For the foregoing reasons, it is respectfully submitted that this contention of the Petitioner is without merit.

II. The Fifth Circuit's Decision Is In Accord With All Prevailing Jurisprudence.

On Page 11 of the Petition, the Petitioner again states the Fifth Circuit erred in applying the *Lavender vs. Kurn, supra,* test in deciding the Seaman Status under the Jones Act. As was pointed out by Respondent in the foregoing section, it is clear that the Fifth Circuit did not apply the Lavender test in making its ruling. Accordingly, this contention is also without merit.

III. The Fifth Circuit Did Not Apply *Lavender vs. Kurn* To The Issue Of Seaman's Status.

Again the Petitioner insists that the Fifth Circuit is applying *Lavender vs. Kurn* to the Issue of Seaman's Status. It is clear from the Fifth Circuit's Opinion that this was not done. The Fifth Circuit applied the standard as set forth in *Boeing vs. Shipman, supra.* The Fifth Circuit reversed the Trial Court ruling that all of the evidence, reviewed in the light most favorable to Mr. Bazile, could have supported a finding of Seaman Status.

At the trial, Respondent stated that he had formally been a deck-hand on several of the Petitioner's vessels. In addition, he had helped run the Cappy and was a "stand-by" on that vessel. He also described various jobs he had done on various vessels as set forth on Page 3-A of the Petition.

Based on the foregoing testimony, Respondent submits the Fifth Circuit was correct in holding there was sufficient evidence to support a finding of Seaman's Status.

The Petitioner submits that the effect of the Fifth Circuit's Opinion herein creates Constitutional infirmities and lack of judicial economy by limiting the Judicial Court's power over the Jurisdictional issue of Seaman's Status. In support of this argument, the Peti-

tioner offers the ludicrous example of a circus clown bringing a Jones Act Suit. Perhaps a more appropriate hypothet would be that of an employee whose duties included many of the traditional duties done by seaman, i.e. — deck-hand work, handling lines, painting and chipping, tying and untying vessels and the like, who is injured when one of his employer's vessels rams a dock causing the employee to slip and fall. Suppose then, the employee brings a Jones Act Suit alleging Seaman's Status. Suppose further, in an effort to defeat the employee's claim, the employer introduces questionable documentary evidence in defense of the employee's claim and parades several of its other employees into Court with the same objective. Finally, further suppose that the owner of the company, when confronted with a United States Public Health Masters Certificate, which classifies the employee as a deck-hand/wiper on a vessel in his fleet, states he falsified the certificate in order to help the employee obtain hospital care. (See Page 9-A of Petition, Footnote 2). Given these circumstances, the Respondent respectfully submits that the granting of a Judgment Notwithstanding the Verdict finding Seaman's Status would be clear error. Accordingly, this contention is also without merit.

IV. The Fifth Circuit's Decision Is In Accord With Decisions In All Other Circuits.

Again Petitioner contends its position has merit because not one Court, State or Federal, Trial or

Appellate, has ever applied the *Lavender* "any evidence" standard to the Jurisdictional question of Seaman's Status. It is quite clear the Fifth Circuit did not apply this standard in reversing the Trial Court. The Petitioner's continuous reliance on this contention shows there is no merit to its position whatsoever.

V. Respondent's Claim Is That Of A Seaman Under The Jones Act For Negligence.

In Part V of Petitioner's Brief, the Petitioner takes it upon itself to advise this Honorable Court that the Respondent is covered under the Longshoreman's and Harbor Workers' Compensation Act. Fortunately, for Respondent, the Petitioner is not the trier of facts in this matter. The obvious weakness of the Petitioner's determination of the Respondent status is readily apparent from the record herein. A jury of reasonable men who have previously heard all of the evidence in this matter, has made a factual finding that the Respondent was a Seaman. No other comment need be made regarding this part of the Petitioner's Brief.

CONCLUSION

Considering the foregoing, Respondent submits that the decision below is clearly correct. It is obvious that there are no decisions of other Circuits in conflict with the Fifth Circuit regarding the test to be applied to Sea-

man Status. Manifestly, there is no important question of Constitutional Law requiring review by this Court.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on Winston Edward Rice, Esq., of New Orleans, Louisiana this date by mailing same as required by Rule 33-1 of this Court.

New Orleans, Louisiana, July ____, 1980.

DARRYL J. TSCHIRN

JOHN M. ROBIN

Supreme Court, U. S.
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No. 79-1806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BISSO TOWBOAT COMPANY,
Petitioner,

versus

LEO BAZILE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF OF PETITIONER

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For the Fifth Circuit

REPLY BRIEF OF PETITIONER

PETITIONER'S ARGUMENT ADDRESSED TO THE ISSUE FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

In his Brief in Opposition, Leo Bazile advances no arguments and cites no authority in support of the application of the *Lavender v. Kurn*[1] "any evidence" test to

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1 327 U.S. 645

the jurisdictional issue of seaman's status. Instead, and as evidence that no such arguments or authorities exist, Bazile contends that the United States Court of Appeals for the Fifth Circuit did not apply the *Lavender v. Kurn* test but rather the "reasonable basis" standard of *Boeing Co. v. Shipman*[2] in reversing the Trial Court's grant of a judgment notwithstanding the jury verdict as to status. Because this argument was first raised in Bazile's Brief in Opposition, Bisso Towboat Company feels compelled to address its lack of merit herein in accordance with Rule 24(4) of this Honorable Court.

In short, Bazile repeatedly quotes and cites the following section of the Fifth Circuit's opinion in support of its contention that the *Lavender v. Kurn* standard was not applied:

> We find that even applying the less strict standard of *Shipman,* the granting of the motion for a judgment notwithstanding the verdict was improper. There was sufficient testimony from the plaintiff to support a verdict that he was a seaman.[3]

Bazile argues that these two isolated sentences, and apparently just the first, mean that *Boeing Co. v. Shipman* and not *Lavender v. Kurn* governed the decision of the Fifth Circuit. As the following will illustrate, Bazile has

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2 411 F.2d 365

3 606 F.2d 101, at 104; Respondent's Brief in Opposition pp. 3, 4, 5 and 7.

taken this portion of the Fifth Circuit's opinion out of context.

Initially and without even looking to other parts of the Fifth Circuit's opinion, it is readily apparent from the use of the word "even" in the first sentence of the above quoted portion of the opinion that the Fifth Circuit was not actually applying *Boeing Co. v. Shipman* but rather indicating that, in its opinion, it would make no difference *to the outcome* of the case if that decision, rather than *Lavender v. Kurn*, were controlling. This is a far cry from holding that *Boeing Co. v. Shipman* states the rule of law upon which the case was decided, and this Honorable Court should not be misled by Bazile's "selective quotations."

That Bazile has quoted the Fifth Circuit out of context, and that the "any evidence" test of *Lavender v. Kurn* was actually applied to the jurisdictional issue of seaman's status, is apparent from the first paragraph of the opinion, below, to-wit:

> It is also true that under *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945) the trial judge in a Jones Act case is bound by a stricter rule — only when there is a complete absence of probative facts supporting the verdict can he grant a motion for a judgment notwithstanding the verdict. 327 U.S. at 653, 66 S.Ct. 740.

Plainly, had the Fifth Circuit not actually been applying *Lavender v. Kurn* to the jurisdictional issue of sea-

man's status, it would not have distinguished the rule it believes appropriate in Jones Act cases from the *Boeing Co. v. Shipman* rule applicable to all other matters.

In summary, Bazile, armed with no arguments supporting the application of *Lavender v. Kurn* to the jurisdictional issue of seaman's status, has resorted to throwing up a "smoke screen" in an effort to cloud the issues sufficiently enough for denial of the Petition for Certiorari herein. Should that tactic be successful, the Fifth Circuit's opinion below will hereafter interdict the trial bench in that circuit from ever taking the jurisdictional issue of seaman's status from the jury, even after a jury finding that has no reasonable basis. The unfortunate consequences set forth in Petitioner's original brief would then follow.

CONCLUSION

For these reasons, Bisso Towboat Company urges this Honorable Court to see beyond Bazile's misleading tactics, to issue the writ of certiorari as prayed for, and to, in due course, reinstate the "reasonable basis" standard of *Boeing Co. v. Shipman* as the test for determining the jurisdictional issue of seaman's status.

Respectfully submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing Reply Brief of Petitioner were served on Darryl J. Tschirn, Esq. and John M. Robin, Esq., of Covington, Louisiana, this date by mailing same as required by Rule 33(1) of this Court.

New Orleans, Louisiana, September ____, 1980.

_____

WINSTON EDWARD RICE